Muhibbah Engineering (M) Bhd v Pemungut Hasil Setem

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCvC-348–03 OF 2016
YEOH WEE SIAM J
8 DECEMBER 2016

Revenue Law — Stamp duty — Exemptions — Facility agreement required plaintiff to provide negative pledge to bank that it would not create any encumbrance on its assets — Plaintiff argued negative pledge did not make facility agreement a loan agreement or instrument 'with security' and claimed for refund of stamp duty paid on facility agreement under para 2 of the Stamp Duty (Remission) (No 2) Order 2012 — Whether negative pledge was a 'security' as it was undertaking/guarantee by plaintiff that if bank recalled facility on demand repayment of monies owing would not be encumbered by third party interests

In a letter of offer to the plaintiff, Maybank Islamic Bhd ('the bank') approved the transfer/refinancing of the plaintiff's existing combined tradelines of RM265m into Islamic combined trade facilities of RM595m. The transaction was to be secured by a facility agreement and a negative pledge from the plaintiff to the bank. The facility granted to the plaintiff was repayable on demand. By virtue of the negative pledge, the plaintiff undertook not to, inter alia, 'create or permit to arise or subsist any encumbrance, mortgage, charge, pledge, lien, right of retention, right of set off or any other security interest on the whole or any part of its present or future assets ...'. Following the execution of the documents, the plaintiff paid the defendant RM1,980,000 in stamp duty on the facility agreement and separate stamp duty on the negative pledge. The plaintiff later sought for refund of the stamp duty paid on the facility agreement under the Stamp Duty (Remission) (No 2) Order 2012 ('the Remission Order 2012') which allowed remission of stamp duty paid on any loan agreement or loan instrument without security for any sum of money repayable on demand or in a single bullet repayment which was in excess of 0.1%. The defendant rejected the application for refund. With the bank's assent, the plaintiff then amended the facility agreement with a supplemental amendment and restatement agreement ('SARA') in order to delete all mention of 'security documents' in the facility agreement and provided for SARA to be retrospectively effective from the date of the facility agreement. Using SARA in support, the plaintiff again sought for the stamp duty refund but the defendant once again turned down the request. The plaintiff then filed the instant originating summons ('OS') for an order that it was entitled to the stamp duty refund under Remission Order 2012. The plaintiff contended that the negative pledge was not a 'security' as it was not an asset/property that could be converted to cash in the event of a winding up. The plaintiff bolstered its

argument by saying the bank's letter of offer did not require it to lodge a Form 34 (Statement of Particulars to be Lodged with Charge) with the Companies Commission of Malaysia under s 108(1) of the Companies Act 1965 ('the Act') to secure the facility. The defendant replied that the letter of offer and facility agreement contained the words 'security' or 'jaminan' to guarantee the loan and therefore the facility agreement did not fulfill the criteria under the Remission Order 2012 to allow for remission of stamp duty.

Held, dismissing the OS:

(1) The facility agreement, together with the amendments and further provisions in SARA, were agreements which were with security. The plaintiff was therefore not entitled to remittance of stamp duty as provided in para 2 of the Remission Order 2012 (see para 46).

(2) The covenant and duty of the plaintiff to carry out the 'Negative Pledge' was tantamount to a 'security' under the facility agreement. Although the plaintiff did not pledge any tangible asset or property as security that could be disposed, sold and converted to cash to pay the facility, under cl 1.1 of the facility agreement the negative pledge was the plaintiff's undertaking that it would not create any security interest over its assets. The plaintiff thus gave the bank a security in the form of a guarantee for the fulfilment of an undertaking for repayment of a loan. The bank was assured by the plaintiff's negative pledge that if demand was made, the plaintiff would be able to pay back the loan without encumbrance from other claims. In that way, the bank was guaranteed that recall of the loan on demand was secured (see paras 38–39).

(3) Despite the amendments made to the facility agreement by SARA, at that point in time when the defendant first stamped the facility agreement, stamp duty was chargeable and payable by the plaintiff by reason of the fact the loan agreement or instrument, with all its provisions on security given through the 'security documents', was one with security and not one without security as provided in para 2 of the Remission Order 2012 (see para 43).

(4) Form 34 was not relevant and could not be used to determine the interpretation of 'security' in the instant case. The facility agreement did not require the plaintiff to file Form 34. Form 34 was for the purpose of s 108(1) of the Act. The 'Negative Pledge' to be performed by the plaintiff did not fall within the scope of s 108(1) of the Act (see para 45).

[Bahasa Malaysia summary

Di dalam surat tawaran kepada plaintif, Maybank Islamic Bhd ('bank') meluluskan pemindahan/pembiayaan semula gabungan perniagaan plaintif sebanyak RM265 juta kepada gabungan kemudahan perniagaan Islam sebanyak RM595 juta. Transaksi adalah dijamin dengan perjanjian

kemudahan dan cagaran negatif daripada plaintif kepada bank. Kemudahan diberikan kepada plaintif boleh dibayar semula atas tuntutan. Mengikut cagaran negatif, plaintif akujanji untuk tidak, antara lain, 'create or permit to arise or subsist any encumbrance, mortgage, charge, pledge, lien, right of retention, right of set off or any other security interest on the whole or any part of its present or future assets ...'. Berikutan pelaksanaan dokumen-dokumen tersebut, plaintif membayar defendan duti setem sebanyak RM1,980,000 atas perjanjian kemudahan tersebut dan duti setem berasingan ke atas cagaran negatif. Plaintif kemudiannya memohon untuk bayaran balik duti setem yang dibayar ke atas perjanjian kemudahan di bawah Perintah Duti Setem (Peremitan) (No 2) 2012 ('Perintah Peremitan 2012') yang mana membenarkan peremitan duti setem yang dibayar ke atas apa-apa perjanjian pinjaman atau instrumen pinjaman tanpa jaminan bagi apa-apa jumlah wang yang boleh dibayar atas tuntutan atau di dalam bayaran balik sekaligus yang mana berlebihan sebanyak 0.1%. Defendan menolak permohonan untuk bayaran balik. Dengan persetujuan bank, plaintif kemudiannya meminda perjanjian kemudahan tersebut dengan perjanjian pemindahan dan pernyataan semula tambahan ('SARA') untuk membatalkan kesemua sebutan 'security documents' di dalam perjanjian kemudahan dan diperuntukkan bagi SARA secara retrospektif berkuat kuasa dari tarikh perjanjian kemudahan. Dengan menggunakan SARA sebagai sokongan, plaintif sekali lagi memohon untuk bayaran balik duti setem tetapi defendan sekali lagi menolak permintaaan tersebut. Plaintif kemudiannya memfailkan saman pemula ini ('SP') bagi perintah bahawa ia berhak kepada bayaran balik duti setem di bawah Perintah Peremitan 2012. Plaintif berhujah bahawa cagaran negatif bukan 'security' kerana ia bukan aset/hartanah yang boleh ditukarkan kepada tunai jika terdapat penggulungan. Plaintif mengukuhkan penghujahannya dengan menyatakan surat tawaran bank tidak memerlukannya untuk mendaftarkan Borang 34 (Pernyataan Butir-Butir untuk dimasukkan bersama Caj) dengan Suruhanjaya Syarikat Malaysia di bawah s 108(1) Akta Syarikat 1965 ('Akta') untuk menjamin kemudahan tersebut. Defendan menjawab surat tawaran tersebut dan perjanjian kemudahan yang mengandungi perkataan-perkataan 'security' atau 'jaminan' untuk menjamin pinjaman tersebut dan oleh itu perjanjian kemudahan tidak memenuhi kriteria di bawah Perintah Peremitan 2012 untuk membenarkan peremitan duti setem.

Diputuskan, menolak SP:

(1) Perjanjian kemudahan, bersama dengan pindaan dan selanjutnya peruntukan di dalam SARA, adalah perjanjian-perjanjian yang bersama jaminan. Plaintif oleh itu tidak berhak kepada peremitan duti setem seperti yang diperuntukkan di dalam perenggan 2 Perintah Peremitan 2012 (lihat perenggan 46).

(2) Perjanjian dan tugas plaintif untuk menjalankan 'Negative Pledge' tersebut adalah sama seperti 'security' di bawah perjanjian kemudahan.

Walaupun plaintif tidak mencagarkan apa-apa aset nyata atau hartanah sebagai jaminan yang boleh dilepaskan, dijual dan ditukarkan kepada tunai untuk membayar kemudahan, di bawah klausa 1.1 perjanjian kemudahan tersebut cagaran negatif adalah akujanji plaintif bahawa ia tidak akan membentuk apa-apa faedah jaminan terhadap aset-asetnya. Plaintif oleh itu memberi bank tersebut jaminan dalam bentuk jaminan bagi memenuhi akujanji untuk bayaran balik pinjaman. Bank dijamin oleh cagaran negatif plaintif bahawa jika tuntutan dibuat, plaintif dapat membayar balik pinjaman tersebut tanpa halangan daripada tuntutan-tuntutan lain. Dengan cara tersebut, bank dijamin bahawa penarikan balik pinjaman tersebut atas tuntutan diperolehi (lihat perenggan 38–39).

(3) Meskipun pemindaan yang dibuat kepada perjanjian kemudahan oleh SARA, pada ketika itu apabila defendan pertama kali mengesahakan perjanjian kemudahan, duti setem boleh dicajkan dan dibayar oleh plaintif atas alasan fakta perjanjian pinjaman atau instrumen, dengan kesemua peruntukanya ke atas jaminan yang diberi melalui 'security documents', adalah satu dengan jaminan dan bukan satu tanpa jaminan seperti diperuntukkan di dalam perenggan 2 Perintah Peremitan 2012 (lihat perenggan 43).

(4) Borang 34 tidak relevan dan tidak boleh digunakan untuk menentukan tafsiran 'security' di dalam kes ini. Perjanjian kemudahan tidak memerlukan plaintif untuk memfailkan Borang 34. Borang 34 adalah bagi tujuan s 108(1) Akta. 'Negative Pledge' untuk dilaksanakan oleh plaintif tidak terangkum di dalam skop s 108(1) Akta (lihat perenggan 45).]

Notes

For cases on exemptions of stamp duty, see 10(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3154–3156.

Cases referred to

Government Insurance Office (NSW) v KA Reed Services Pty Ltd [1988] VR 829 (refd)

Howie v New South Wales Lawn Tennis Ground Ltd (1955) 95 CLR 132, HC (refd)

National Telephone Company, Limited v Commissioners Of Inland Revenue [1899] 1 QB 250, CA (folld)

Sweetmeat Automatic Delivery Company Limited v Commissioners of Inland Revenue; Jones v Same [1891-4] All ER Rep Ext 1387; [1895] 1 QB 484, QB (folld)

The National Telephone Company, Limited v The Commissioners Of Inland Revenue [1900] AC 1, HL (folld)

Legislation referred to

Companies Act 1965 s 108(1), Ninth Schedule, para 2(1)(n)(iii)
Companies Regulations 1966 Form 34
Stamp Act 1949 ss 4(1), 14A, First Schedule, Items 22(1)(b), 27(a)
Stamp Duty (Remission) (No 2) Order 2012 para 2

Preetha Pillai (Khong Siong Sie with her) (Skrine) for the plaintiff.
Shafini bt Saman (Irfan Munashik Jantan with her) (Inland Revenue Board) for the defendant.

Yeoh Wee Siam J:

ENCLOSURE 2

[1] Enclosure 2 is the plaintiff's originating summons ('OS') applying for the following orders:

(a) surat tawaran bank daripada Maybank Islamic Berhad ('Bank') kepada Muhibbah Engineering (M) Berhad ('Plaintif') bertarikh 20 November 2013, Perjanjian Fasiliti di antara Bank dan Plaintif bertarikh 2.6.2015 dan 'Supplemental Amendment and Restatement Agreement Relating to a Facility Agreement' di antara Bank dan Plaintif bertarikh 28.12.2015 ('Perjanjian-perjanjian Fasiliti') layak untuk menuntut peremitan di bawah Perintah Duti Setem (Peremitan) (No 2) 2012 bagi sebahagian pinjaman sebanyak RM495,000,000.00;

(b) sekiranya Perjanjian-perjanjian Fasiliti layak untuk menuntut peremitan di bawah Perintah Duti Setem (Peremitan) (No 2) 2012, duti setem yang telah terlebih dibayar atas Perjanjian-perjanjian Fasiliti bagi sebahagian fasiliti sebanyak RM495,000,000.00 dikembalikan/dibayar balik oleh Defendan kepada Plaintif; dan

(c) relif selanjut dan/atau relif lain sebagaimana Mahkamah yang Mulia ini fikirkan suai manfaat.

BACKGROUND FACTS

The plaintiff's facilities with Maybank Islamic Bhd

[2] Pursuant to the letter of offer dated 20 November 2013 from Maybank Islamic Bhd ('the bank' or 'Maybank') to the plaintiff ('letter of offer') (exh A1–1 of plaintiff's affidavit in support ('AIS')), the bank has approved the transfer/refinancing of the plaintiff's existing combined tradelines of RM265m into Islamic combined trade facilities of RM595m.

[3] The salient terms of the letter of offer are as follows:

(a) the facilities offered by Maybank to the plaintiff include these facilities with the following limits:

Type of Facilities	Existing Limit (RM)	New Limit (RM)
Letter of Credit Wakalah-i ('LCW-i') (Sight) Murabahah Letter of Credit-i ('LCM-i') (sight/ 80 days) Trust Receipt-i ('TR-i') (180 days) Accepted Bills-i ('AB-i') (sales/purchase) 180 days Bank Guarantee-i ('BG-i (Fin)') Bank Guarantee-i ('BG-i (Non Fin)')	265,000,000	595,000,000
Total	265,000,000	595,000,000

(b) at p 2 of the letter of offer under the paragraph titled 'Payment', the facility was granted by Maybank to the plaintiff on the following basis:

> *Subject to yearly review and payable on demand.*
>
> Notwithstanding any other provisions herein stated related to the availability of the facilities or any part thereof, the Bank reserves the right to recall / cancel the facilities or any part thereof at any time it deems fit without assigning any reason thereto by giving written notice of the same, whereupon the facility or such part thereof shall be cancelled and the whole indebtedness or such part thereof be repayable on demand;

(c) the paragraph titled 'Transaction/Security Documents' at p 2 of the letter of offer states that the instruments to the facility are:

(i) facility agreement (exh A2 of the plaintiff's AIS in encl 1); and

(ii) fresh negative pledge.

[4] In accordance with the terms of the letter of offer:

(a) the facility agreement and the negative pledge, both dated 2 June 2015, were signed by the plaintiff and Maybank; and

(b) insofar as the adjudication for stamp duty payable on the facility agreement and the negative pledge was concerned:

(i) stamp duty of RM1,980,000 was imposed by the defendant and paid by the plaintiff for the facility amounting to RM495m (stamp duty of RM400,000 imposed on the facility amounting to RM100m had already been paid by the plaintiff to the defendant pursuant to an earlier bank letter of offer dated 19 May 2011); and

(ii) stamp duty of RM10 was imposed on the fresh negative pledge executed for the full amount of the facilities of RM595m and was duly paid by the plaintiff.

The plaintiff's appeals to the defendant

[5] The plaintiff, via its solicitors, Messrs Skrine, wrote a letter of appeal dated 17 August 2015 to the defendant to seek for remission and refund of stamp duty on the basis that the facility agreement fulfils the criteria prescribed in the Stamp Duty (Remission) (No 2) Order 2012 (PU(A) 258/2012) ('the Remission Order 2012'), ie stamp duty imposed on any loan agreement or loan instrument without security for any sum or sums of money repayable on demand or in a single bullet repayment which is in excess of 0.1% is remitted.

[6] The defendant via its letter dated 15 September 2015 rejected the applicability of the Remission Order 2012 and maintained the amount of stamp duty payable on the facility agreement.

[7] On 8 October 2015, the plaintiff was made to understand by the defendant that the rejection on the applicability of the Remission Order 2012 was due to the relevant references of the word 'security' in the existing facility agreement, although the plaintiff contends that in substance the facility was a 'clean' facility with no collateral or 'security', as intended by the parties.

[8] On 9 October 2015 the plaintiff, via its solicitors, again wrote to the defendant to request for the reassessment of the facility agreement dated 2 June 2015, and informed the defendant that a supplemental amendment and restatement agreement will be provided to the defendant for its review and assessment for the purposes of the appeal.

[9] By way of a letter dated 28 December 2015, the supplemental amendment and restatement agreement dated 28 December 2015 ('SARA') (exh A10 of the plaintiff's AIS) was made available by the plaintiff to the defendant for the purpose of the review and assessment. The SARA was made to be effective from the date of the original facility agreement. The plaintiff contends that the objective of the agreement was to clarify and clearly reflect

that *no security is, has been, or will be created for the plaintiff's facilities.*

[10] The defendant via its letter dated 12 February 2016 again rejected the applicability of the Remission Order 2012 after reviewing the SARA.

ISSUES

[11] The issues for determination by this court are:

(a) whether the term 'Negative Pledge' in the facility agreement carries the meaning of 'security' ('jaminan' or 'cagaran'); and

(b) whether the facility agreement and the SARA ('facility agreements') are entitled to the remission of stamp duty as accorded by the Remission Order 2012.

DECISION OF THE HIGH COURT ON ENCL 2

[12] On 8 November 2016, after hearing both parties, I dismissed the plaintiff's OS. I held that the plaintiff is required to pay the stamp duty charged by the defendant. I ordered the plaintiff to pay the defendant costs of RM4,000, subject to payment of the allocatur fee of 4% of the costs.

GROUNDS FOR DECISION

Remittance under the Remission Order 2012

[13] Paragraph 2 of the Remission Order 2012 provides as follows:

> 2 Remission
>
> The amount of stamp duty that is chargeable under subsubitem 22(1)(b) of the First Schedule to the Act upon a loan agreement or loan instrument *without security* for any sums or sums of money *repayable on demand* or in single bullet repayment under that subsubitem which is *in excess of zero point one per cent (0.1%) is remitted.* (Emphasis added.)

[14] The crux of the matter before this court is whether the 'loan agreement' or 'loan instrument', ie the facility agreements in this case, are 'without security' for the sums of money which are 'repayable on demand'. In determining this, the court would consider, inter alia, whether the term 'negative pledge' can be construed as being akin to 'security'. If it is found that the facility agreements are without security, then the plaintiff is entitled to the remittance of stamp duty as provided in para 2 of the Remission Order 2012.

The plaintiff's case

[15] The plaintiff contends that the facility agreements fulfil the criteria prescribed in the Remission Order 2012, and the plaintiff is therefore entitled to the remission of stamp duty under the Remission Order 2012.

[16] The plaintiff supports its case based on the following reasons:

(a) the facility under the letter of offer is without any security. The term 'security' generally refers to any mortgage, charge, lien or right of interest in rem which secures the liability of a party or any agreement or arrangement that has the effect of conferring priority on the assets/properties (usually tangible) of the security provider in the event of winding up of the debtor/borrower. A negative pledge is not an asset/property which can be reflected in the books of the borrower, nor can it be realised into cash in the event of winding up;

(b) the terms 'Facility Agreement' and 'New Negative Pledge' in the letter of offer are both transaction documents in nature rather than as a form of security or collateral;

(c) there is no Form 34 (Statement of Particulars lodged to be with Charge) pursuant to s 108(1) of the Companies Act 1965 that has been executed by the plaintiff and lodged with the Companies Commission of Malaysia ('CCM') for the purpose of securing the facility under the letter of offer; and

(d) the facility under the letter of offer is repayable by the plaintiff to Maybank on demand.

[17] The plaintiff also contends that its case is further strengthened by the confirmation of the facility provider, Maybank, that the facility provided by Maybank to the plaintiff is *without security* and is repayable by the plaintiff to Maybank on demand (para 5 of Maybank's AIS). Maybank, like all banks must in their reporting obligations to Bank Negara Malaysia on their banking reserves, classify the facilities into secured and non-secured, and as do external auditors when preparing audited financial statements in compliance with para 2(1)(n)(iii) of the Ninth Schedule of the Companies Act 1965.

[18] The said Ninth Schedule provides as follows:

NINTH SCHEDULE

[Sections 169, 326]

ACCOUNTS

Balance Sheet

2(1) *There shall be shown as at the end of the period of accounting —*

(n) under separate headings and showing separately amounts that are redeemable or payable not later than twelve months after the date to which the accounts are made up and amounts that are redeemable or payable later than twelve months after that date —

(i) ....;

(ii) ....;

(iii) *bank loans and overdrafts, distinguishing between those which are secured and those which are unsecured*; and

(iv) *other amounts borrowed without security*,

giving *details of the contractual terms and, where secured, of the nature of that security;* (Emphasis added.)

The defendant's case

[19] The defendant contends that:

(a) both the bank's letter of offer and the facility agreement which were signed by both parties contain the word 'security' or 'jaminan' to guarantee the said loan. Therefore, the facility agreement does not fulfil the condition as provided in the Remission Order 2012; and

(b) the assessment of the stamp duty as notified to the plaintiff by the defendant through the notice of assessment ('Notis Taksiran') for the sum of RM1,980,000 is accurate and correct according to Item 22(1)(b) read with Item 27(a) of the First Schedule to the Stamp Act 1949.

Evaluation and findings of the court

[20] The defendant's power to collect stamp duty is provided in s 4(1) of the Stamp Act 1949:

4 Instruments chargeable with duty.

(1) Subject to this Act and subject to the exemptions contained in this Act and in any written law for the time being in force, the several instruments specified in the First Schedule shall, from and after the commencement of this Act, be chargeable with the several duties specified in such Schedule.

[21] Based on the wording in s 4(1) of the Stamp Act 1949, I agree with the defendant's submission that stamp duty is chargeable on the 'instrument', and not on the 'transaction'.

[22] In addition to s 4(1), s 14A of the Stamp Act 1949 provides for stamp duty to be charged for principal or primary securities as follows:

14A Principal Securities in Syariah financing.

Where it is shown that a principal or primary security secures the repayment of moneys provided under a scheme of financing made according to the syariah, duty chargeable thereon shall be calculated on the principal amount provided by the financier or financing body.

[23] Further to ss 4(1) and 14A of the Stamp Act 1949, Items 22(1)(b) and 27(a) of the First Schedule to the same Act provide for stamp duty to be charged as follows:

Item 22(1)(b)	
BOND, COVENANT, LOAN, SERVICES, EQUIPMENT LEASE AGREEMENT OR INSTRUMENT of any kind whatsoever:	RM1.00
(1)(a) ...	
(b) for any sum or sums of money, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack;	The same ad valorem duty as a charge or mortgage for such total amount.;
Item 27(a)	
27 CHARGE OR MORTGAGE, AGREEMENT FOR A CHARGE OR MORTGAGE (including that under the Syariah), BOND, COVENANT, DEBENTURE (not being a marketable security) BILL OF SALE by way of security and WARRANT OF ATTORNEY to confess and enter up judgment:	
(a) Being the only or principal or primary security (other than an equitable mortgage or an assignment of receivables or the kind mentioned in paragraph (d)) for the payment or repayment of money —	
(i) ...	
(ii) ...	
(iii) in any other case — For each RM1,000 or part thereof.	RM5.00

[24] In the light of the above statutory provisions for stamp duty to be charged, the question now is whether the plaintiff should be given the remittance of stamp duty.

[25] In the bank's letter of offer (exh A1 of the plaintiff's AIS in encl 1), 'security documents' have been given the meaning as follows:

TRANSACTION/ SECURITY DOCUMENTS	i) Facility Agreement. ii) Fresh Negative Pledge.

[26] As rightly pointed out by the defendant, the facility agreement does refer to 'security documents'. This can be seen in the definitions in cl 1.1 of the agreement as follows:

Security Documents	collectively this Agreement, the Negative Pledge, the Trade Finance Contract Note and all other security documents for the time being or from time to time constituting security for the payment obligations and liabilities (including but not limited to the payment of the Indebtedness) of the Customer under and in connection with the Facility and references to the 'Security Documents' shall include references to any one or more of them;.

[27] In the same cl 1.1, 'Negative Pledge' has been defined as follows:

Negative Pledge	means the negative pledge granted by the Customer in favour of the Bank undertaking inter alia that it will not create or permit to arise or subsist any encumbrance, mortgage, charge, pledge, lien, right of retention, right of set off or any other security interest on the whole or any part of our present or future assets other than: (a) liens arising in the ordinary course of business or by operation of law; and (b) security interests existing at the date hereof provided the same has been disclosed to you prior to the date hereof and subject to the amount outstanding and secured thereby at all times and at any time hereafter not exceeding the amount so disclosed at the date hereof;.

[28] It is further noted that cl 15 of the facility agreement provides extensively for 'SECURITY' as follows:

15 SECURITY

15.1 Covenant Relating to Security

In consideration of the Bank granting the Facility, *the Customer* shall in addition to this Agreement, on or before the execution of this Agreement, *execute*:–

(a) *the Negative Pledge.*

15.2 Continuing Security

(a) The *security created pursuant to the Security Documents are expressly*

intended to be and shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to the Bank by the Customer whether alone or jointly and severally with another or others and whether as principal or surety notwithstanding that the Customer may at any time or times cease to be indebted to the Bank for any period or periods of time and notwithstanding that the Designated Current Account or any other account or accounts of the Customer with the Bank may from any cause whatsoever cease to be a current account or accounts and notwithstanding any settlement of any account or accounts or otherwise.

(b) *This Agreement shall be without prejudice to any security already given by the Customer to the Bank or any security which may hereafter be given to the Bank whether the same be for securing payment of the Indebtedness* or any part or parts thereof or any other moneys covenanted to be paid herein and under the other Security Documents and whether such security is taken as additional or collateral security or otherwise howsoever.

15.3 Covenant to Provide Further Security

(a) *The Customer shall at any time if and when required by the Bank so to do execute in favour of the Bank* or as the Bank shall direct *such legal or other mortgages, charges, assignments, transfers or agreements as the Bank shall require of and on all the Customer's estate, right, title and interest in any property or assets or goods or business* now belonging to or which may hereafter be acquired by or belong to the Customer (including any vendor's lien for unpaid moneys) and the benefit of all licences held in connection therewith, to *secure the Indebtedness* hereby agreed to be paid or intended to be hereby secured, such mortgages, charges, assignments, transfers or agreements to be prepared by or on behalf of the Bank at the cost of the Customer and to contain all such terms and conditions for the benefit of the Bank as the Bank may reasonably require.

(b) The *Customer hereby further covenants with the Bank* that *it will at all future times at the request of the Bank* and at the Customer's own costs *charge to or deposit with the Bank the documents of title to any or all movable and immovable properties vested in the Customer for* any *tenure and all or any debenture shares stocks or other investments or securities registered in the name of the Customer or otherwise belonging to the Customer. Such charge or deposit may be by way of security for* the *payment of the Indebtedness* and may also or otherwise be *for the purpose of securing any other moneys owing to the Bank and not secured hereby.*

(c) In *the event of the Bank requiring security* pursuant to paragraphs (a) and (b) hereof, the Customer shall do all such acts and things, and execute all such further or other documents, as may be necessary or as the Bank may require in order to constitute, render enforceable or *perfect such security or securities and to protect the rights of the Bank* in relation thereto and in particular will, within fourteen (14) days of notice of such requirement, *identify and offer to the Bank the security or securities* and thereafter *execute and or cause to be executed all* and any *instruments of charge and other*

documents relating thereto as required and upon being so requested by the Bank.

(d) *In the event any security or securities offered to the Bank* as *abovestated is or are not acceptable to the Bank*, then the Bank shall give to the Customer a further period of fourteen (14) days from the date of notification thereof, for the *Customer to provide to the Bank a substitute security or securities. If the Bank determines that such substitute security or securities is or are also not acceptable to the Bank, then the Customer shall pay to the Bank the Indebtedness payable by the Customer to the Bank under the Security Documents* within fourteen (14) days from the date of notification thereof by the Bank.

(e) *Any determination by the Bank as to whether such security or securities* (proposed to be provided pursuant to this Clause 15.3) *are acceptable as security or securities shall be in the sole and absolute discretion of the Bank* and the Bank shall not be obliged to give any reasons for its determination. (Emphasis added.)

[29] Clause 16.1(e) of the facility agreement goes on to provide:

16 REPRESENTATIONS AND WARRANTIES

16.1 The Customer acknowledges that the *Bank has entered into this Agreement and the other Security Documents* in full reliance on the representations and warranties by the Customer in the following terms and the Customer hereby represents and warrants to and undertakes for the benefit of the Bank that:

(a) ...

...

(e) all the necessary consents (including without limitation, shareholders or creditors of the Customer) and payment of duty (including stamp duty) or tax and all necessary consents approvals, licences, authorisation of, filing with, or other act by or in respect of any governmental authority required in connection with the execution, delivery performance, validity or enforceability of *this Agreement and the other Security Documents* have been obtained and paid, as the case may be, and *are in full force and effect* and any conditions contained therein or otherwise applying thereto have been complied with; (Emphasis added.)

[30] The plaintiff submits that the facility under the facility agreements is payable on demand by the bank. The plaintiff relies on the meaning of the term 'negative pledge' as defined in the LexisNexis publication of *Words, Phrases and Maxims — Legally and Judicially Defined* (Vol 11 — M, N and O) at [N0059] as:

A provision requiring a borrower, who borrows funds without giving security, to refrain from giving future lenders any security without the consent of the first lender.

[31] According to the plaintiff, the term 'negative pledge' can also be

interpreted as a contractual promise, often included in a debenture or charge, that the chargor will not create any further encumbrances over the charged property without the consent of the chargee. A negative pledge does not itself create a security or proprietary interest in favour of the pledgee (see *Howie v New South Wales Lawn Tennis Ground Ltd* (1955) 95 CLR 132 and *Government Insurance Office (NSW) v KA Reed Services Pty Ltd* [1988] VR 829).

[32] As for the term 'security', the plaintiff further submits that it is extensively defined in the LexisNexis publication of *Words, Phrases and Maxims — Legally and Judicially Defined* (Vol 13 — R and S) at [S0128] as:

> A security is an encumbrance, vested in a creditor, over the property of his debtor, for the purpose of securing the repayment of the debt. It is a right in the property of another, which enables a person, who is entitled to receive a definite value from that another in default of so receiving it, to realise it from that property. The purpose of a security is to ensure, of (sic) facilitate, the fulfilment, or enjoyment, of some other right vested in its owner. Securities may be classified into:
>
> (i) mortgages
>
> (ii) pawns;
>
> (iii) floating charges; and
>
> (iv) lien.
>
> This word has a variety of meaning:
>
> (i) the general name for all mortgages, charges, debentures, etc, whereby repayment of money is assured or secured; or
>
> (ii) any document by which any claim may be enforced.

[33] The court notes that the word 'security' in the Remission Order 2012 has not been defined. The *Concise Oxford Dictionary* (9th Ed) Thumb Index Ed has, inter alia, given the ordinary dictionary meaning of the word 'security' as follows:

> 1 a secure condition or feeling. 2 a thing that guards or guarantees ... 4 a thing deposited or pledged as a guarantee of the fulfilment of an undertaking or the payment of a loan, to be forfeited in case of default ....

[34] The defendant relies on the following cases which I think are applicable to the present case.

[35] In *Sweetmeat Automatic Delivery Company Limited v Commissioners of Inland Revenue; Jones v Same* [1891-4] All ER Rep Ext 1387; [1895] 1 QB 484, Wright J stated:

> ... *the word 'security'* as used in these schedules does not mean as in popular language

some obligation which is auxiliary to some other obligation, but *means any obligation which is created by an instrument*. (Emphasis added.)

[36] The decision in *Jones* was agreed to by the Court of Appeal in *National Telephone Company, Limited v Commissioners of Inland Revenue* [1899] 1 QB 250, where AL Smith LJ went on further to state:

> The question, however, is not what in ordinary parlance could be called a security, but *what is the meaning of the word 'security' in this taxing Act*; (Emphasis added.); and
>
> a bond given for the payment of a sum of money at stated periods, or *a covenant given for such payment, is clearly a security within the meaning of the Act*. (Emphasis added.)

[37] Subsequently, the House of Lords in *The National Telephone Company, Limited v The Commissioners Of Inland Revenue* [1900] AC 1 upheld the decision of the Court of Appeal in *National Telephone Company, Limited v Commissioners Of Inland Revenue.*

[38] Following the decisions in the above three cases, it is clear that the covenant and duty of the plaintiff to carry out the 'Negative Pledge' (exh A4 of the plaintiff's AIS) tantamounts to a 'security'. This therefore renders the facility agreement to be an agreement 'with security'.

[39] In the present case, it is true that the plaintiff did not pledge any tangible asset or property as security that can be disposed, sold and converted to cash to pay the facility. However, it must be noted that according to cl 1.1 of the facility agreement, the negative pledge by the plaintiff to the bank is an 'undertaking' that the plaintiff 'will not create or permit to arise or subsist any encumbrance, mortgage, charge, pledge, lien, right of retention, right of set off or any other security interest on the whole or any part of the plaintiff's present or future assets' other than those provided in (a) and (b) therein. Therefore, it can be construed that whilst the plaintiff did not pledge any tangible asset as a security, the plaintiff has given an undertaking not to create any security interest in the plaintiff's assets. This means that, if construed within the meaning of the word 'security' as stated in the *Concise Oxford Dictionary*, the plaintiff has given to the bank a 'security' in the form of 'a guarantee of the fulfilment of an undertaking or the payment of a loan'. By the 'obligation created by an instrument', namely the facility agreement (following the meaning of the word 'security' as explained by Wright J in *Jones*), the bank is assured by the plaintiff's negative pledge that when the bank demands the sum loaned under the facility agreement, the plaintiff is able to pay back the loan or facility since the plaintiff is not encumbered by other claims on the plaintiff. In that way, the bank is guaranteed that recall of the loan on demand can be secured.

[40] In view of the express provisions in the facility agreement that the 'security documents' ie the facility agreement and the negative pledge constitute 'security for the payment obligations and liabilities of the customer' ie the plaintiff, I agree with the submissions of the defendant that the plaintiff's facility agreement is a loan agreement or loan instrument *with security.* It is not one 'without security' as envisaged in para 2 of the Remission Order 2012 to entitle the plaintiff to remittance of stamp duty as provided therein.

[41] It is observed that the plaintiff and the bank had agreed to amend the facility agreement dated 2 June 2015 through the SARA and its further provisions on 28 December 2015 by removing all references to 'security documents'. It appears to me that the plaintiff intended to ensure that the facility agreement qualifies as a loan agreement or loan instrument 'without security' under para 2 of the Remission Order 2012. The SARA was made effective retrospectively on 2 June 2015 ie on the same date as the facility agreement. It is obvious that the plaintiff is now relying on the SARA, to be read together with the facility agreement, in order to claim the remittance of stamp duty.

[42] The said amendments have been tabulated clearly by the defendant in 'Apendiks A' of its submissions (see 'Apendiks A' annex hereto).

[43] Despite the said amendments which have been made to the facility agreement, I am of the opinion that at that point in time when the defendant first stamped the plaintiff's facility agreement dated 2 June 2015, stamp duty was already chargeable and therefore had to be paid by the plaintiff by reason of the fact that the loan agreement or loan instrument, with all its provisions on security given through the 'security documents', is one *with security*, and not one 'without security' as provided in para 2 of the Remission Order 2012.

[44] The plaintiff further submits that the facility agreement is without security since it does not involve the registration of Form 34 (Statement of Particulars to be Lodged with Charge) according to s 108(1) of the Companies Act 1955 with the CCM in order to guarantee the facility under the bank's letter of offer.

[45] However, I am of the opinion that Form 34 is for the purpose of s 108(1) of the Companies Act 1965. The 'Negative Pledge' to be performed by the plaintiff does not fall within the scope of s 108(1) of the Companies Act 1965. As such, Form 34 is not applicable to it. In any case, nowhere in the facility agreement does it refer to the plaintiff's obligation to file Form 34. To my mind, Form 34 is not relevant, and should not be used as a determinant for the interpretation of 'security' in the present case.

DECISION

[46] Based on the foregoing considerations, it is clear that the facility agreement, together with the amendments and further provisions in SARA, are agreements which are with security. The plaintiff is therefore not entitled to the remittance of stamp duty as provided in para 2 of the Remittance Order 2012.

Order accordingly.

Originating Summons dismissed.

Reported by Ashok Kumar